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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

Berentje C. M. Pohlman,

Petitioner

v.

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Berentje C. M. Pohlman, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit entered in the above entitled case on August 27, 1975.

OPINIONS BELOW

The opinion of the Three Panel Court of the

Circuit Court of Appeals, unreported, is printed in Appendix A hereto, infra, pages 1 thru 9, and the opinion of the Circuit Court of Appeals, en banc, unreported, is printed in Appendix B hereto, infra, pages 1 thru 14. The judgment of the Three Panel Court was entered on February 11, 1975, and the judgment of the court en banc was entered on the 27th day of August, 1975. Any Journal Entry of such judgments is not known to petitioner.

JURISDICTION

The judgment of the Three Panel Court was entered on February 11, 1975. A timely petition for rehearing was filed by respondent, and the court en banc by opinion rendered on August 27, 1975 reversed the opinion of the Three Panel Court and affirmed the judgment of the United States District Court for the State of North Dakota, as entered on September 30, 1974.

The jurisdiction of the United States Supreme Court is invoked under the following:

1. UNITED STATES CONSTITUTION, ARTICLE 3,

& 2, Cl. 2, conferring upon the United States Supreme Court "appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

2. 28 U.S.C. & 1254, providing "Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

3. PART V, Rule 19 of the Supreme Court Rules, providing for review by writ of certiorari, subsection (b), which reads:

> "(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or . . ."

QUESTIONS PRESENTED

1. Whether, in the light of all circumstances, noncustodial investigations are subject to protection under the Fifth Amendment guarantees relating to self-incrimination?

2. Was the trial court in error in the failure to rule on defendant's objection to the admission into evidence of documents alleged by defendant to be only copies and without inquiry as to possible existence of original documents?

3. Adequacy of trial court's jury instruction relating to meaning of "Willfulness" to justify conviction under the provisions of 26 U.S.C. & 7203.

4. Whether references by U. S. Attorney to alleged conversations between defendant and the Internal Revenue Regional office without the opportunity of confrontation was Plain Error under Rule 52 (b) of the Federal Rules of Criminal Procedure and violative of accused's rights under the Sixth Amendment?

5. Whether an accused is subject to conviction of a criminal charge in the absence of evidence presented by prosecution of any direct or overt act or statements proving a mental attitude to commit

an illegal act during the time that such alleged illegal act is alleged to have been committed?

STATUTES INVOLVED

1. UNITED STATES CONSTITUTION, AMENDMENT 5:

> "Criminal actions--Provisions concerning Due process of law and just compensation clauses.--No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danager; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken, for public use, without just compensation."

2. 26 U.S.C. & 7203, Willful Failure to File Return, Supply Information, or Pay Tax:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regula-

tions, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

3. UNITED STATES CONSTITUTION, AMENDMENT 6:

"Rights of the accused--In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

4. FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 51:

"Exceptions unnecessary.--Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

5. FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 52:

"Harmless error and plain error.--
(a) Harmless error.--Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error--Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT

The jurisdiction of the United States District Court for the District of North Dakota was conferred in this case under 26 U.S.C. & 7203.

The petitioner herein was indicted on a three count charge of willfully failing to file her personal income tax returns for the years 1968, 1969 and 1970. Jury trial was held in said District Court in September of 1974 and defendant was convicted of the three counts. The defendant appealed to the Circuit Court of Appeals for the Eighth Circuit and the matter was heard before a three judge panel on December 11, 1974. On February 11, 1975, the three judge panel reversed the conviction and

remanded the case for a new trial. The U. S. Attorney thereafter petitioned for and was granted a rehearing en banc by the Circuit Court of Appeals. On August 27, 1975 the Circuit Court of Appeals sitting en banc reversed by a three to five decision the early reversal and affirmed the conviction. Appendix B, pages 1 thru 14.

Petitioner is a practicing attorney and tax practitioner in Enderlin, North Dakota. The first contact between petitioner and the Internal Revenue service relating to her personal tax matters was on October 3, 1972 when an agent of the District Office, Fargo, North Dakota, called upon petitioner in her law office in Enderlin, North Dakota. At the first meeting the IRS agent requested a copy of her 1971 income tax return, which return was then supplied by petitioner. Further, at this initial meeting the agent informed petitioner that the tax practice conducted from her office (with the assistance of two other local women) was to be investigated by the Irs. The agent then requested a copy of or list

of petitioner's legal clients. Petitioner did not have such a list immediately abailable, and would not give such a list to the agent. However, with the full cooperation of the petitioner, the agent was given free access to the tax practice files. The agent, in conjunction with several other agents out of the Fargo Internal Revenue Service office, thereafter spent several weeks investigating the tax files. Needless audits were conducted against petitioner's tax clients, for the end result of the investigation revealed no fraudulent practices or evidence of incompetency by either the petitioner or her two assistants.

The agent testified that the purpose of investigating the tax practice files was to obtain a list of the petitioner's cliental.[1] The petitioner herein sets forth this point specifically to establish that the agent had not come to her office for the purpose of auditing, but was there for the purpose of obtaining evidence of criminal activity.

[1]. Transcript, pages 36 and 37

The matter of petitioner's personal income tax returns for the years 1968, 1969 and 1970 was not discussed between the agent and petitioner until several days after the initial contact. It was petitioner's allegations during the trial, and remains her position, that by reason of the agent's conduct prior to this discussion she was gravely apprehensive as to presence of the IRS, and for that reason she told the agent she had not filed the returns, whereas she later maintained that the returns had been filed with IRS in April of 1971.

On October 11, 1972, petitioner delivered to the agent copies of her personal returns for the years in question.

It has been the contention of the IRS that the only purpose of the initial visit to petitioner's office was for the purpose of audit. Therefore, it is contended by the prosecution that no warning as to self-incrimination need be given to the person being investigated. It is the contention of this petitioner that she was under criminal investiga-

tion from the moment of first contact with the IRS agent, and the files and records herein substantiate that contention.

It is the contention of this petitioner that the IRS agents involved in this matter commenced a concentrated program whereby this petitioner was to be entrapped into the commission of a felony and to bring this case under jurisdiction of 26 U.S.C. & 7201[1]. The matter of the tax practice conducted through the petitioner's office seemed to be the matter of earlier concern of the IRS. The files disclose that the business was conducted properly and as a joint association between petitioner and two other women.

REASONS FOR GRANTING THIS WRIT

AS TO QUESTION NO. 1

Merely classifying an IRS agent as merely an auditing agent is not in itself sufficient to immune his real purposes from constitutional guaran-

1. Transcript pages 164 thru 166

tees. In the case at hand, the agent was not from his initial contact merely seeking to audit returns. His purpose was to obtain evidence to confirm some alleged criminal conduct on the part of petitioner. The fact that the petitioner's tax practice was under investigation is ample evidence that petitioner was under suspicion of illegal conduct. An agent may so testify that his only purpose was to conduct an audit, but his actions confirm that his purpose was that of investigation. Under such circumstances, the absence of any warnings to the suspect of the right to remain silent was proper grounds for the trial court to sustain objection to allowing the agent to testify as to any conversations between the agent and the suspect. This petitioner was not given any constitutional rights warning until April 18, 1973, and the disregard of the court of this fact was prejudicial error.

AS TO QUESTION PRESENTED NO. 2

Where objection was raised under the Best Evidence rule as to admission of copies, it was the

duty of the court to at least inquire as to the possible existence of original documents. The first witness presented by the prosecution in this case was an employee of the Internal Revenue Service's Service Center in Ogden, Utah, who testified that a search of the records at the center revealed returns filed for the petitioner on the 11th day of October, 1972.[1] On cross-examination of the intelligence agent[2] the petitioner was able to ascertain that the returns did not leave the Fargo office of the IRS until May of 1973. Therefore, herein lies one of the most flagrant inconsistencies of record. The witness from the IRS center in Ogden, Utah was not asked by the U. S. Attorney to identify the returns attempted to be later used in evidence. The petitioner contends that she prepared original returns from the information contained on the handwritten work copies that were delivered by her to the agent, and that these

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[1] Transcript, page 11
[2] Transcript, page 165

original typed returns were mailed by her to the then IRS office in Kansas City on April 21, 1971.[1] Considerable emphasis was placed by the prosecution on the fact that petitioner did not prepare the returns until after the agent contacted her. The record verifies that the returns had been prepared by the petitioner (with the assistance of the two women in her office) in the spring of 1971.[2] It was during this part of the testimony that it was established that it was not until the spring of 1971, after the returns had been prepared, that petitioner was aware that she had any substantial tax bill for the years in question.[3] From the facts established (from what petitioner acknowledges to be a somewhat confused record), the trial court was in error in sustaining the prosecution's position and not ruling on petitioner's objections that the copies of the tax returns were not original documents.

1. Transcript, pages 175 thru 188; pages 200-201
2. Transcript, page 97
3. Transcript, page 201

AS TO QUESTIONS PRESENTED NO. 3

The essential issue in this case is the meaning of the word "Willfullness" as used in 26 U.S.C. & 7203. The lower courts having a lack of uniformity in their interpretations of the meaning and intent of the word "Willfullness" as so used, there exists the necessity of obtaining the interpretation of the Supreme Court in order to have uniformity among the lower courts.

It is the contention of petitioner that to be guilty of violation of 26 U.S.C. & 7203, the accused must be possessed of a state of mine and purpose to intentional violate the law at the time of the alleged crime, and that the accused acted with an evil motive and bad intent.

The trial court's instruction to the jury in this case on the subject of willfullness reads:

> "The specific intent of willfulness is an essential element of the crime of failure to file an income tax return. The word "willfully" used in connection with this offense means deliberately, and intentionally, and without justifiable excuse, or with the wrongful purpose of

deliberately intending not to file a return which defendant knew she should have filed, in order to prevent the Government from knowing the extent of, and knowing the facts material to, the determination of her tax liability.

Defendant's conduct is not "willful" if she acted through negligence, inadvertence, or mistake, or due to her good faith misunderstanding of the requirements of the law. It should be pointed out, however, that disagreement with the law is not a defense. It is the duty of all citizens to obey the law whether they agree with it or not."

Petitioner had requested the following instruction:

"2. Willfulness is an essential element of the crime of which defendant is charged in the indictment. An act is done "willfully" if done purposely with the specific intent to disregard the law, or to do that which the law forbids, and further means an act done with a bad purpose, the existence of specific wrongful intent, and evil motive at the time the crime charged was committed; mere laxity, careless disregard of duty imposed by law, or even gross negligence, unattended by "evil motive," is not probative of willfulness."

Petitioner entered specific objection to the court's proposed instruction. The trial court declined to consider or give petitioner's requested above set forth instruction.

Petitioner freely admitted that her act in failing to file the returns on time had been one of carelessness on her part; however, the essential element of the crime would be the mental attitude and conduct of the accused at the time of the alleged crimes, not the attitude and conduct several years later. At the time of this trial the petitioner had endured nearly two years of harassment from the IRS, and after an ordeal of such nature she may have displayed qualities of hostility to the service.

The decisions of the Supreme Court on the subject of "Willfullness" support the petitioner's contentions. In United States v. Murdock, 290 U.S. 389, the court in considering the context of the misdemeanor section concluded that willful as an element of the offense connoted "bad faith or evil intent", and stated:

"Here we are concerned with a statute which denounces a willful failure to do various things thought to be requisite to a proper ad-

ministration of the income tax law, and the Government, in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith, to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense. (Emphasis supplied)

In the more recent case of United States v. Bishop, 412 U. S. 346 (1973), the court said:

> "Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done "willfully," the bad purpose or evil motive described in Murdock, supra."

In Spies v. United States, 317 U. S. 492, the court stated that "willfullness" for the purposes of both the misdemeanor and felony of "willfully" attempting to evade taxes includes " "some element of evil motive and want of justification in view of the financial circumstances of the taxpayer." '

In the case at hand, the lower courts have read into this matter their own conjectures.

The majority opinion of the Circuit Court of Appeals en banc states that the issue involved was that petitioner had failed to file her tax returns in protest against single taxpayer prejudice. As far as petitioner's defense was concerned, she had never raised this issue, but the issue was used by the prosecution to incur jury prejudice[1].

"Bad purpose and evil motive to disobey the law" is essential to the existence of criminal intent, and the failure of the trial court to so instruct the jury in petitioner's case, or in any case, will result in prejudicial reasoning by a jury charged, and did result in prejudicial reasoning by the jury.

AS TO QUESTION PRESENTED NO. 4

During the course of petitioner's testimony she stated that she had been unable to elicit any information from the investigating agents as to why or as to what she was being charged, and that she

1. Transcript, page 105

had visited the Regional Office of the IRS in St. Paul, Minnesota in August of 1973 in an attempt to ascertain the facts of the investigation.[1]

Herein again lies a facet of the trial proceedings highly prejudicial to the petitioner. The U. S. Attorney seised upon the fact that petitioner had finally been advised to a degree of charges she faced after visiting the St. Paul Regional office. In particular, the record discloses[2] that the U. S. Attorney in his argument to the jury made references to petitioner's visit to St. Paul wherein she is alleged to have said that her defense would be - -"financial problems and also that they couldn't prove willfulness and so forth." These issues were not discussed during the cross-examination of petitioner by the U. S. Attorney concerning her visit to St. Paul, and such references were purely hearsay, violative of the accused's rights under the Sixth Amendment relating to the right of con-

1. Transcript, page 203
2. Transcript, page 226

frontation of witnesses against him, and constituted Plain Error under Rule 52 (b) of the Federal Rules of Criminal Procedure.

AS TO QUESTION PRESENTED NO. 5

In his argument to the jury the U.S. Attorney told the jury that the matter of criminal intent on the part of petitioner could not be proved by any direct evidence[1], but that the defendant should be convicted on circumstantial evidence. That petitioner was evasive with the investigating agents is not denied, but in the light of facts of record wherein these agents were attempting to entrap the petitioner into the commission of a felony, it is argued that petitioner had ample reason to be wary. The fact that petitioner was not financially able to cope with the demands made upon her for business, personal and tax reasons should not be grounds for labeling her as a criminal. Where there is a factual situation wherein the accused is maintaining a luxurious standard of living, participating in some

1. Transcript, page 228

questionable business or anti-social activities, or is advocating defiance of the law, the Government may be justified in its use of the Internal Revenue Service to keep civil order. However, the record in this case substantiates that petitioner was not in any manner involved in any fraudulent activities, that her activities as a tax practitioner were free of any questionable practices, and there was no showing of any unethical or questionable activities in the conduct of her legal work. Notwithstanding that the IRS investigation revealed nothing more than that petitioner had been subjected for many years to difficult financial demands and had devoted a substantial amount of her time and energies to public service, a jury is told by the prosecution that she should be convicted by what he, the prosecutor says. The prosecution had unlimited means, both in form of finances and in form of personnel, to produce witnesses against the petitioner and to produce direct evidence, had the same existed. The only witnesses produced by the

prosecution were people who verified that the petitioner had earned a certain gross income, and that from time to time the petitioner had borrowed money. None of these activities should be construed to constitute a criminal intent.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 74-1759

United States of America, *
*
Appellee, *
* Appeal from the United States
v. * District Court for the
* District of North Dakota.
*
Berentje C. M. Pohlman, *
*
Appellant. *

Submitted: December 11, 1974.

Filed: February 11, 1975.

Before LAY and BRIGHT, Circuit Judges, and TALBOT SMITH, Senior District Judge.*

LAY, Circuit Judge.

Berentje C. M. Pohlman, a practicing attorney in Enderlin, North Dakota, was convicted by a jury of willfully failing to file her individual income tax returns for the years 1968, 1969 and 1970 in violation of 26 U.S.C. § 7203. Ms. Pohlman's basic defense was that she served as City Attorney of Enderlin in 1969 and as Mayor in 1970, and that she was so involved and busy in these positions, as well as with certain personal problems, that she did not realize until late in 1970 that she had earned

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* TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

income sufficient to require filing. She maintained all her files and records and when visited by a field auditor of the Internal Revenue Service in early October 1972, she prepared returns for each of the years in question and filed them. On appeal she appears pro se, as she did in the trial court, raising several errors.[1] We need only discuss her attack on the instruction given by the trial court concerning the element of willfulness. We find this to have been reversible error and vacate the judgment of conviction and remand for a new trial.

Title 26 U.S.C. § 7203 makes it a misdemeanor[2] when a person "willfully fails . . . to make such return [as required by law] . . . at the time or times required by law . . ." (emphasis added). The court declined to give defendant's requested

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1. Ms. Pohlman contends the trial court erred in permitting Agent Engelmann to relate the conversation which occurred in her office on October 3, 1972, during which she admitted not having filed the returns since she was not informed of her constitutional right to remain silent prior to the conversation. She was not in custody, however, at the time of the conversation and we have frequently held that no warning need be given during a noncustodial investigation. See United States v. MacLeod, 436 F.2d 947, 950 (8th Cir.), cert. denied, 402 U.S. 907, rehearing denied, 402 U.S. 990 (1971); United States v. Brevik, 422 F.2d 449, 450 (8th Cir.), cert. denied, 398 U.S. 943 (1970); United States v. Ping, 407 F.2d 157 (8th Cir. 1969); Muse v. United States, 405 F.2d 40, 41 (8th Cir. 1968), cert. denied, 393 U.S. 1117 (1969); Cohen v. United States, 405 F.2d 34, 35-40 (8th Cir. 1968), cert. denied, 394 U.S. 943 (1969). See also cases cited at 405 F.2d 37 n.7.

2. The defendant was fined a total of $1500.00 and placed on probation for two years.

instruction on the meaning of willfulness[3] and, over her specific objection, gave the following:

> The specific intent of willfulness is an essential element of the crime of failure to file an income tax return. The word "willfully" used in connection with this offense means deliberately, and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed, in order to prevent the Government from knowing the extent of, and knowing the facts material to, the determination of her tax liability.
>
> Defendant's conduct is not "willful" if she acted through negligence, inadvertence, or mistake, or due to her good faith misunderstanding of the requirements of the law. It should be pointed out, however, that disagreement with the law is not a defense. It is the duty of all citizens to obey the law whether they agree with it or not.[4]

She contends that the court's instruction did not adequately define "willfully" as that word is used in § 7203. We agree. The controlling authorities are United States v. Bishop, 412 U.S. 346 (1973), and United States v. Murdock, 290 U.S. 389 (1933).

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3. The requested instruction was:

> 2. Willfulness is an essential element of the crime of which defendant is charged in the indictment. An act is done "willfully" if done purposely with the specific intent to disregard the law, or to do that which the law forbids, and further means an act done with a bad purpose, the existence of specific wrongful intent, and evil motive at the time the crime charged was committed; mere laxity, careless disregard of duty imposed by law, or even gross negligence, unattended by "evil motive," is not probative of willfulness.

4. This instruction is taken, with minor changes, from 2 Devitt & Blackmar, Federal Jury Practice and Instruction § 52.31 (1970).

In Murdock, the defendant had refused to supply information to the Internal Revenue Service concerning deductions claimed in his 1927 and 1928 income tax returns. He insisted that the Fifth Amendment permitted him to refuse the information since it would incriminate him under state law. He was charged with and convicted of willfully failing to supply the information. In upholding the reversal of his conviction, the Court discussed the meaning to be given the word "willfully" in tax crime statutes:

> The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose . . . .

290 U.S. at 394.

> Here we are concerned with a statute which denounces a willful failure to do various things thought to be requisite to a proper administration of the income tax law, and the Government, in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith, to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.

Id. at 397-98 (emphasis added).

In Bishop, the Court was faced with the question of whether the word "willfully," as used in those several statutes defining misdemeanor tax crimes, had the same stringent meaning it had been accorded when used in the definition of a felony tax crime. The Court not only found that it did but went on to emphasize

the necessity for determining the "bad purpose" articulated in Murdock:

> . . . The Court's consistent interpretation of the word "willfully" to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.
>
> Until Congress speaks otherwise, we therefore shall continue to require, in both tax felonies and tax misdemeanors that must be done "willfully," the bad purpose or evil motive described in Murdock, supra.

412 U.S. at 361.

Defendant's basic contention is that the court's instruction failed to sufficiently describe the requirement of wrongful intent and evil motive required under the law. Several cases have held both before and after Bishop that the specific words "bad purpose" or "evil motive" need not be used by the courts in defining the element of willfulness. See cases collected in Cooley v. United States, 501 F.2d 1249 (9th Cir. 1974), and United States v. Hawk, 497 F.2d 365 (9th Cir.), cert. denied, 95 S.Ct. 67 (1974). What is required, however, is that the instruction convey "the proper notion of specific intent in understandable terms." United States v. Hawk, supra at 369. As the Seventh Circuit observed in United States v. Matosky, 421 F.2d 410, 412 (7th Cir.), cert. denied, 398 U.S. 904 (1970), "the only bad purpose or bad motive necessary for the government to prove is a deliberate intention not to file returns which the defendant knew ought to be filed." This court approved such an instruction under § 7203 in Lumetta v. United States, 362

F.2d 644 (8th Cir. 1966).[5]

The basic question in the present case is whether the trial court sufficiently and accurately defined the specific intent required. Concededly there is no mention of "bad purpose" as used in Lumetta and other cases decided previously by this court. See also United States v. MacLeod, 436 F.2d 947, 950 (8th Cir.), cert. denied, 402 U.S. 907 (1971).

The art of instructing a jury in plain and understandable terms requires, on the part of the trial judge, an acute awareness of the extraordinary demands made upon him in the skill of communication. In many trial courts the practice varies as to whether or not the jury charge goes to the jury room,[6] but where under either procedure there lurk shortcomings or dangers in effectively communicating to the jury, the charge should always seek out explicit and clear language in layman's terms. Unfortunately, as has often been said, the trial court writes instructions in terms more for the benefit of the appellate court than for the lay jury.

The questioned instruction does attempt to imply that "bad purpose" may be an element of the crime by excluding from the

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5. The full instruction in Lumetta, however, was later disapproved in a post-Bishop case since it erroneously embodied Murdock language which allowed a definition of willfulness to include "careless or reckless disregard." See United States v. Bengimina, 499 F.2d 117 (8th Cir. 1974).

6. In this circuit, we have recently held that furnishing written instructions to the jury lies within the discretion of the trial court. See, United States v. Johnson, 466 F.2d 537 (8th Cir. 1972), cert. denied, 409 U.S. 1111 (1973).

meaning of "willful" "negligence, inadvertence or mistake or . . . good faith misunderstanding of the requirements of the law." The instruction mentions that willful does include the wrongful purpose of deliberately intending not to file a return when the defendant knew she should file. However, the court prefaces this meaning by saying that "willfully" also means doing something "deliberately and intentionally, and without justifiable excuse."[7] Yet early in Murdock the Supreme Court observed that one who acts deliberately and intentionally and without legal justification must still be found not guilty if he did not possess, in addition, a state of mind which manifested a bad purpose or evil motive to violate the law. Murdock at 397-98.

Here the defendant attempted to justify her failure to file her returns because of the pressing demands of her public and private life. There is no doubt that she did not have a legal justification for failing to comply with the law. The jury was told that if it found the defendant did not have a justifiable excuse for failing to file this alone would be sufficient to convict her. Herein lies the prejudice. Under the charge the jury could have believed the reason Ms. Pohlman gave for failing to file, a reason which negates mens rea if believed, and yet have found her guilty. Their verdict could have resulted from a belief that, although this was the reason, it was not justifiable under the law. As discussed, more is required to be culpable under the statute. The jury must find that her failure to file arose from a bad motive and evil intent to commit an illegal act, fully aware of her legal obligation to do otherwise.

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7. In setting this meaning off from the rest of the instruction the court uses the disjunctive "or".

Since bad purpose and evil motive are essential elements of willfulness under § 7203, we see no reason that the jury should be afforded the ambiguity of an instruction which possibly denotes otherwise. If these are essential elements of the misdemeanor the jury should be told so in plain and unambiguous terms. As this court reaffirmed in United States v. Achtenberg, 459 F.2d 91 (8th Cir.), cert. denied, 409 U.S. 932 (1972):

> "Obviously, if the jury is to function effectively, it must be given a clear statement of each element which the Government must prove. The elements, as expressed in the statute, are hardly set forth with sufficient clarity to permit the jury to perform its duty intelligently. . . ."

Id. at 97, quoting from Jackson v. United States, 348 F.2d 772, 774 (D.C. Cir. 1965).[8]

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8. A much preferable instruction is found in another recent Ninth Circuit case, United States v. Klee, 494 F.2d 394 (9th Cir. 1974):

> The term willfully used in the statute which I have read to you, that is, referring to one who willfully fails to make such a return, means voluntary, purposeful, deliberate and intentionally [sic], as distinguished from accidental, inadvertent, or negligent.
>
> Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law.
>
> The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful, and with the specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or evil motive to disobey or disregard the law which requires to (sic) file a timely return which discloses to the government facts material to the determination of his tax liability.

Judgment reversed and remanded for a new trial.[9]

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8. (continued)

There is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes, for the defendant's failure to file to be willful under this provision of the law.

On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident or reckless disregard for the requirements of the law, or due to his good faith misunderstanding of the requirements of the law.

494 F.2d at 395.

9. Although the defendant represented herself at the trial and in this court and was successful here, we strongly urge her to retain independent counsel in the event this matter is to be retried. The degree of personal involvement by a defendant-lawyer in a criminal proceeding makes it extremely difficult for that person to fairly and objectively evaluate the facts and legal issues. We are confident from the record presented that the defendant's attempt to represent herself before the jury materially prejudiced her case. The written briefs and oral presentation made by the defendant in the present case were disorganized, confusing and difficult for this court to follow. In the event the defendant is without funds, she should investigate with the trial court the possible appointment of counsel under the Criminal Justice Act.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 74-1759

United States of America, Appellee, v. Berentje C. M. Pohlman, Appellant.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of North Dakota

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Submitted: June 11, 1975

Filed: August 27, 1975

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, WEBSTER, and HENLEY, Circuit Judges, en banc.

GIBSON, Chief Judge.

Defendant Berentje C. M. Pohlman was convicted by a jury of willfully failing to file her tax returns for 1968, 1969 and 1970 in violation of 26 U.S.C. § 7203 (1970). On appeal a panel of this court found that the jury had not been properly instructed on the issue of willfulness and reversed her conviction. Thereafter a majority of the judges in active service on this court voted to rehear the case en banc, which action vacated the panel opinion. After full consideration by the court en banc, we find none of the issues raised by appellant merit reversal and affirm the conviction.

Pohlman, a practicing attorney in Enderlin, North Dakota, according to her testimony at trial had prepared thousands of tax returns and was fully aware of the Internal Revenue Code provisions requiring the filing of tax returns. She, however, did not file her personal returns for the years in question until October, 1972, after a visit by an IRS field auditor. The reasons given at trial were that she was involved in her positions as City Attorney and Mayor of Enderlin in 1969 and 1970 and had some personal problems so that she did not realize until after the filing deadlines that she had income sufficient to require filing. The returns introduced into evidence at trial indicated that in 1968 she had a gross income from her profession of $22,785 and a taxable income of $7,988; for 1969 she had a gross income of $18,452 and taxable income of $3,269; and for 1970 a gross income of $28,896 and $8,278 taxable income.

Error is asserted in the trial court's refusal to give Pohlman's requested instruction on willfulness.[1] The following instruction, substantially identical to that in 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions

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[1]Defendant's requested instruction read:

> 2. Willfulness is an essential element of the crime of which defendant is charged in the indictment. An act is done "willfully" if done purposely with the specific intent to disregard the law, or to do that which the law forbids, and further means an act done with a bad purpose, the existence of specific wrongful intent, and evil motive at the time the crime charged was committed; mere laxity, careless disregard of duty imposed by law, or even gross negligence, unattended by "evil motive," is not probative of willfulness.

§ 52.31 (1970), was given over Pohlman's specific objection:

> The specific intent of willfulness is an essential element of the crime of failure to file an income tax return. The word "willfully" used in connection with this offense means deliberately, and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed, in order to prevent the Government from knowing the extent of, and knowing the facts material to, the determination of her tax liability.
>
> Defendant's conduct is not "willful" if she acted through negligence, inadvertance, or mistake, or due to her good faith misunderstanding of the requirements of the law. It should be pointed out, however, that disagreement with the law is not a defense. It is the duty of all citizens to obey the law whether they agree with it or not.

The panel decision, in agreeing with Pohlman that the trial court's charge did not adequately describe the concept of willfulness, would require the Government to prove not only that the act was done deliberately, intentionally and without justifiable excuse, but additionally that the defendant had a state of mind which manifested a bad purpose or evil motive to violate the law. It thus would allow a defendant to argue that his motive in refusing to file was good, i.e., it was his manner of protest against wasteful governmental expenditures, expenditures that go for inappropriate or evil purposes, or the higher taxation of single taxpayers as was an issue in the present case. We do not think this additional burden is required.

It is undisputed that the words "evil motive or bad purpose" have been used to convey the concept of willfulness

embodied in § 7203. United States v. Bishop, 412 U.S. 346, 360 (1973); United States v. Murdock, 290 U.S. 389, 398 (1933); United States v. McCorkle, 511 F.2d 482, 485 (7th Cir. 1975) (en banc), petition for cert. filed, 17 Cr.L.Rep. 4082 (U.S. May 1, 1975) (No. 74-1371). The Supreme Court in Murdock v. United States, supra at 397-98, did state that:

> The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.

Additionally, in Bishop v. United States, 412 U.S. 346 (1973), the Court stated that it would "continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in Murdock, supra."

We do not read this, however, to indicate that the Court was engrafting onto the statute a requirement that the Government prove anything beyond establishing that defendant's action was deliberate, intentional and without justifiable excuse, or otherwise stated, a voluntary, intentional violation of a known legal duty.[2] In the same discussion in Bishop, the latest

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[2]The claim that the trial court's instruction does not adequately define willfulness is premised on the use of "without justifiable excuse" when the Supreme Court indicated in Murdock that it was not enough for the Government to prove that an action was "without legal justification." We believe that these two concepts are different and that "without justifiable excuse" includes the concept intended by the Court's "bad purpose" or "evil motive" language. An act might well be without legal justification (i.e., the refusal to disclose sources of income in reliance on a nonexistent Fifth Amendment privilege, as in Murdock) but could be done with justifiable excuse (i.e., a good-faith reliance on the Fifth Amendment

Supreme Court case in this area, the Court stated:

> The Court, in fact, has recognized that the word "willfully" in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfulness as "bad faith or evil intent," Murdock, 290 U.S., at 398, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," Spies, 317 U.S., at 498, or knowledge that the taxpayer "should have reported more income than he did." Sansone, 380 U.S., at 353.

Bishop v. United States, supra at 360.

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2 continued

privilege, as in Murdock). We think the Supreme Court was concerned in Murdock that the Government have to prove that an act was done without justifiable excuse, that is, with a bad purpose or evil motive, and could not rely upon showing the lack of a legal justification to establish willfulness.

However, it must be recognized that clarity and unambiguity are the hallmarks of a good jury instruction. In light of the similarity in language between the two concepts discussed above we think it would be preferable that future instructions on willfulness not embody the language of "without justifiable excuse." We would suggest that the first paragraph of the instruction given by the trial court herein be modified to provide that:

> Willfulness is an essential element of the crime of failure to file an income tax return. The word "willfully" used in connection with this offense means a voluntary, intentional violation of a known legal duty, or otherwise stated, with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed, in order to prevent the Government from knowing the extent of, and knowing the facts material to, the determination of her tax liability.

Thus, rather than indicating that "bad purpose or evil motive" is a requirement to be proved in addition to the voluntary, intentional violation of a known legal duty, the Court's statement indicates that "bad purpose or evil motive" is merely another way to convey the concept of willfulness. See United States v. McCorkle, 511 F.2d 482 (7th Cir. 1975) (en banc).[3]

Cases decided both before and after Bishop have been in agreement that "willfully" as used in § 7203 requires only that the Government prove a voluntary, intentional violation of a known legal duty. United States v. McCorkle, 511 F.2d

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[3]The court stated therein:

> Contrary to the defendant's contentions, we believe that the Court employed the terms "bad purpose" and "evil motive" as a convenient method of referring to the longer definition of "willfully" as a "voluntary, intentional violation of a known legal duty," and not as engrafting an intent to defraud requirement or other similar evil purpose on that definition.

United States v. McCorkle, 511 F.2d 482, 485 (7th Cir. 1975) (en banc); accord, United States v. Hawk, 497 F.2d 365, 368 (9th Cir.), cert. denied, 419 U.S. 838 (1974).

482 (7th Cir. 1975) (en banc); United States v. Bengimina, 499 F.2d 117 (8th Cir. 1974); United States v. Hawk, 497 F.2d 365 (9th Cir.), cert. denied, 419 U.S. 838 (1974); United States v. Klee, 494 F.2d 394 (9th Cir.), cert. denied, 419 U.S. 835 (1974); United States v. Matosky, 421 F.2d 410 (7th Cir.), cert. denied, 398 U.S. 904 (1970); cf. Boardman v. United States, 419 F.2d 110 (1st Cir. 1969), cert. denied, 397 U.S. 991 (1970).

The trial court's instruction on willfulness in this case fairly and adequately charged the jury as to what the Government had to establish to support a conviction. There was clearly sufficient evidence for the jury to find that Pohlman's failure to file was a voluntary, intentional violation of a known legal duty.

In addition to the alleged error in instructions, the appellant contends that the court erred in the admission into evidence of conversations with Internal Revenue agents, receiving into evidence photocopies of her 1968, 1969 and 1970 returns, and use of hearsay evidence in the cross-examination of appellant.

Agent Engelmann testified to conversations occurring in Pohlman's office on or about October 3, 1972, without informing her of her constitutional right to remain silent. In that conversation she admitted to not having filed the returns. Noncustodial investigation of this type does not require a Miranda warning. United States v. MacLeod, 436 F.2d 947, 950 (8th Cir.), cert. denied, 402 U.S. 907 (1971); United States v. Brevik, 422 F.2d 449, 450 (8th Cir.), cert. denied, 398 U.S. 943 (1970); Muse v. United States, 405 F.2d 40, 41 (8th Cir. 1968), cert. denied, 393 U.S. 1117 (1969); Cohen v. United States, 405 F.2d 34, 35-40 (8th Cir. 1968), cert. denied, 394 U.S. 943 (1969).

The appellant's objection to admission of photocopies of her 1968, 1969 and 1970 returns is not well taken. Mr. Engelmann, the IRS Field Audit Agent, testified that these photocopies were the returns which Pohlman signed in his presence October 11, 1972. Although Pohlman had contended that they were merely photocopies of returns she had previously filed, the record establishes that they were adequately identified as being the original returns filed with Engelmann October 11, 1972.

The questioning of Pohlman concerning her prior statements to Internal Revenue agents as to her failure to file returns was not error. The questioning sought testimony as to Pohlman's prior inconsistent statements. As Pohlman was a party-defendant, her hearsay statements could properly be used against her as admissions. United States v. Pistante, 453 F.2d 412 (9th Cir. 1971). See generally McCormick on Evidence ¶ 239 (1954).

The judgment of conviction is affirmed.

LAY, HEANEY and BRIGHT, Circuit Judges, Dissenting.

We respectfully dissent. The defendant is entitled to a new trial based on the trial court's erroneous instruction.

We sense there exists no fundamental disagreement between the majority and dissenting views herein on the law governing the definition of willfulness under § 7203. At issue here is the adequacy of the district court's instructions; in other words whether the district court properly conveyed to the jury the necessary elements of the offense under § 7203.

The majority concedes lack of clarity in the district court's instruction and suggests modification of the instruction. However, in doing so, it finds no prejudicial error.

In view of the Supreme Court opinion in United States v. Bishop, 412 U.S. 346 (1973), there should exist no major dispute as to what the term willful means under § 7203. Bishop emphasized that an essential element of willfulness is a specific intent to evade the law. The Supreme Court in Bishop observed:

> The Court's consistent interpretation of the word "willfully" to require an element of mens rea implements the pervasive intent of Congress to construct penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers.

Id. at 361.

This court in United States v. Bengimina, 499 F.2d 117 (8th Cir. 1974), recognized that the term willful is consistent with the rule in Bishop. Judge Gibson in announcing the court's decision at that time wrote:

> This requirement of willfulness has been formulated as:
>
> "[B]ad faith or evil intent," Murdock, 290 U.S. at 398, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer," Spies, 317 U.S., at 498, or knowledge that the taxpayer "should have reported more income than he did." Sansone, 380 U.S., at 353.

Id. at 119 (emphasis added).

Our earlier panel opinion recognized that it is not essential to include the terms "bad purpose or evil motive" in the definition of willfulness as long as the trial court makes clear that willfulness is a "voluntary, intentional violation of a known legal duty." The panel also recognized

that the decisions of United States v. Hawk, 497 F.2d 365 (9th Cir.), cert. denied, 419 U.S. 838 (1974), United States v. Klee, 494 F.2d 394 (9th Cir.) cert. denied, 419 U.S. 835 (1974)and United States v. McCorkle, 511 F.2d 482 (7th Cir. 1975)(en banc), petition for cert. filed, 17 Cr.L. 4082 (U.S. May 1, 1975)(No. 74-1371) all hold that the statute does not require proof of intent to defraud.

The trial court instructed the jury that the defendant could be convicted if she intended not to file a return when she knew she should file. However the court also instructed the jury that the defendant could be guilty under § 7203 if she simply failed to file "deliberately, intentionally and without justifiable excuse." [1] If we correctly understand the reasoning of the majority opinion it is urged that "without justifiable excuse" supplies the missing element of mens rea, that is the bad purpose and evil motive not to comply with a known legal duty. The majority reasons that in the future it would be better to abandon the phrase "without justifiable excuse" and instruct specifically that there must be a voluntary and intentional violation of a known legal duty. [2] We agree as to the need for new

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1. In setting this meaning of willfulness off from the rest of the instruction the trial court uses the disjunctive "or."

2. We fail to understand why the language of the majority opinion strains so hard to avoid use of the very language the Supreme Court approved in Murdock and Bishop. "Bad purpose and evil motive to disobey the law" is clearly an element of the offense and are words easily phrased and understood. A much preferred instruction to the abbreviated version suggested by the majority is approved by the 9th Circuit in United States

phraseology, but we respectfully submit the ambiguity resulting from the district court's instruction failed to clearly set forth the necessary requirement of mens rea and resulted in prejudicial error to the defendant.

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2. (continued)

v. Klee, supra. The instruction reads:

> The term willfully used in the statute which I have read to you, that is, referring to one who willfully fails to make such a return, means voluntary, purposeful, deliberate and intentionally,[sic] as distinguished from accidental, inadvertent, or negligent.
>
> Mere negligence, even gross negligence, is not sufficient to constitute willfulness under the criminal law.
>
> The failure to make a timely return is willful if the defendant's failure to act was voluntary and purposeful, and with the specific intent to fail to do what he knew the law requires to be done; that is to say, with a bad purpose or evil motive to disobey or disregard the law which requires to (sic) file a timely return which discloses to the government facts material to the determination of his tax liability.
>
> There is no necessity that the government prove that the defendant had an intention to defraud it, or to evade the payment of any taxes, for the defendant's failure to file to be willful under this provision of the law.
>
> On the other hand, the defendant's conduct is not willful if you find that he failed to file a return because of negligence, inadvertence, accident or reckless disregard for the requirements of the law, or due to his good faith misunderstanding of the requirements of the law.

494 F.2d at 395 n. 1.

Devitt and Blackmar have recently recommended use of the 9th Circuit instruction. See E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 52.31 (Supp. 1975).

The majority reasons that the term "without justifiable excuse" is simply another way of saying that the jury must find a wrongful purpose to disobey the law. In so doing, the majority distinguishes between "without justifiable excuse" and "without legal justification," asserting that the former is a subjective standard and includes the necessary element of mens rea: bad purpose and evil intent. While distinguishing this from the objective standard of "without legal justification" is instructive at this point, no such distinction was drawn for the jury and they may have confused the two standards. [3.]

Herein lies the prejudice. The jury could have believed the reason Ms. Pohlman gave for failing to file, a reason which negates mens rea, and yet have found her guilty. Their verdict could have resulted from a belief that, although the defendant's excuse was the reason, it was not justifiable under the law. The statute plainly requires more. The jury must find that her failure to file arose from a bad motive and evil intent not to file a timely return, fully aware of her obligation to do otherwise. [4.]

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3. The term "without justifiable excuse" encompasses at least the term "without legal justification." Even if it also encompasses the requisite bad purpose and evil motive, as the majority argues, there is no way of knowing whether the jury found the bad purpose required by Murdock and Bishop.

4. The second paragraph of the challenged instruction does not cure the deficiency created by the ambiguity of the term "without justifiable excuse." It is true that the defendant's conduct is not "willful" under the statute, "if she acted through negligence, inadvertance, or mistake, or due to her good faith misunderstanding of the requirements of the law." However, these criteria are stated as defenses,

In United States v. McCorkle, supra, the defendant urged that the trial court failed to instruct that the defendant could not be convicted of willfulness under § 7203 if he possessed a "justifiable excuse." The 7th Circuit disagreed by saying:

> Since the instructions required the jury to find an intentional violation of a known legal duty, it would have been essential for the jury to conclude that McCorkle's conduct was unjustified.

511 F.2d at 486.

However, in this case it was not implicit in the jury's findings that the defendant's reason was unjustifiable that it was also an intentional violation of a known legal duty. An unjustifiable excuse for failure to file does not necessarily inform a layman that it must necessarily be an intentional violation of the law and thus the instruction was deficient.

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4. (continued)

and do not specifically define the government's burden to show that the defendant must have possessed a wrongful purpose in failing to file. It is imperative for the instruction to clearly convey that the government must bear the burden of proving beyond a reasonable doubt that the defendant had the requisite bad purpose and evil motive to evade the law's requirements. Thus, the second paragraph of the instruction is insufficient to cure the ambiguity of the preceding paragraph.

The first paragraph could have been cured by replacing the "or" with "and." If this were done, the jury would have had to find that the offense was done "deliberately, and intentionally, and without justifiable excuse," (even if considered to mean without legal justification) and "with the wrongful purpose of deliberately intending not to file a return which defendant knew she should have filed . . . ." This would have clearly set out the requirement of bad purpose and evil motive.

In United States v. Achtenberg, 459 F.2d 91 (8th Cir.) cert. denied, 409 U.S. 932 (1972) this court emphasized that prejudicial error occurs when the jury is not clearly informed as to the elements of an offense. Our court stated:

> "Obviously, if the jury is to function effectively, it must be given a clear statement of each element which the Government must prove. The elements, as expressed in the statute, are hardly set forth with sufficient clarity to permit the jury to perform its duty intelligently . . . ."

Id. at 97, quoting from Jackson v. United States, 348 F.2d 772, 774 (D.C. Cir. 1965).

It is axiomatic where the instruction is equivocal in a criminal trial the defendant must be given the benefit of doubt as to existing prejudice. See Bollenbach v. United States, 326 U.S. 607, 613 (1946).

Here the jury was given the alternative of convicting if they found the defendant possessed a wrongful purpose to disobey the law or even if she did not, as long as they found there did not exist a justifiable excuse for her failure to file. This was clear error and Ms. Pohlman is entitled to a new trial.

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